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Supreme Court of the United States

October Term, 1968

No. [redacted] 55

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner,

v.

ALFRED COLES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENTS OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

C. C. Peyton, Superintendent of the Virginia State Penitentiary prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit of January 8, 1968, in the case of Alfred Coles v. C. C. Peyton, Superintendent of the Virginia State Penitentiary. On January 29, 1968, the United States Court of Appeals for the Fourth Circuit, upon application of the Superintendent, stayed the mandate, in order that certiorari could be sought in the premises.

OPINIONS BELOW

The memorandum opinion of the Judge of the Hustings Court of the City of Richmond of May 21, 1965, is not reported, but will be found in Appendix I to this brief.

The order of the Hustings Court of the City of Richmond of July 8, 1965, dismissing the petition, after a hearing, is not reported and will be found in Appendix II to this brief.

The order of the Supreme Court of Appeals of Virginia of March 8, 1966, denying the petition for a writ of error, is not reported and will be found in Appendix III to this brief.

The order and opinion of the United States District Court for the Eastern District of Virginia, Richmond Division of July 7, 1966, are not reported, but will be found as Appendix IV to this brief.

The opinion of the court below is not at the time of the filing of this petition reported, and the same will be found in Appendix V to this brief.

THE JUDGMENT

On January 29, 1968, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of its mandate in the premises to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

JURISDICTION

The jurisdiction of this Court to issue the writ of certiorari in the premises is grounded upon the provisions of Section 1254(1), Title 28 U.S.C.

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit Err in Holding That in a Habeas Corpus Proceeding Involving a State Prisoner the Burden of Proof Changes, Requiring the Commonwealth to Prove Certain Facts, Which Could Have Been Proven by the Petitioner, If He Had Deemed Them Pertinent?

STATUTE INVOLVED

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

STATEMENT OF THE CASE

On May 25, 1963, a warrant was issued charging Alfred Coles with rape. Thereafter, at the June 1963 Term of the Grand Jury of the Hustings Court of the City of Richmond, an indictment was returned charging Coles with rape. The date upon which counsel were appointed to represent

Coles is not clear from the record, as no order was entered specifically appointing counsel in this case. In the City of Richmond, a semi-public defender type of system is employed, and counsel are appointed to serve for several terms. Nevertheless, on June 11, 1963, on motion of the public defender appointed to represent Coles, he was committed to Central State Hospital at Petersburg, Virginia, for observation and report as to his mental condition. A report was thereafter filed by Dr. Milton H. Khibbe, Superintendent of the Central State Hospital. On August 6th, an order was entered, directing that he be returned to Richmond to stand trial. Another order was entered along the same lines on August 29, 1963.

On September 18, 1963, he entered a plea of not guilty, waived trial by jury, was tried by the Court, found guilty, and the matter was referred for a presentence report. On November 27, 1963 Coles was sentenced to serve a term of twenty-five years in the penitentiary by the Judge of the Hustings Court of the City of Richmond, Virginia. He is presently detained pursuant to that judgment.

Raymond H. Dupuy and Robert J. Smith were public defenders at the time that an indictment was returned against Coles, charging him with rape. As hereinbefore pointed out, it is not clear when they were appointed to represent him, but he was represented by counsel at the time of the commitment for mental observation.

Dupuy, who actually represented him at his trial, has been engaged in the practice of law since 1930. He was called as a witness on behalf of Coles at the plenary hearing held in the State court and was examined very carefully as to the length of time the first conference which he had with his client consumed. He could not state the length of time but testified, "I can't say other than to say

we took all the time we thought necessary" (Tr. 9). He testified relative to the facts of the offense as follows: "We went into all details." He saw his client once again at the City Jail and then again prior to trial at the courthouse. Dupuy testified as a witness for the petitioner that the question of a medical examination of the prosecutrix was never discussed (Tr. 13-14).

Again testifying as a witness on behalf of Coles, Dupuy stated that Coles admitted to him that he had intercourse with the prosecutrix. His version was that the argument was over whether or not he was to pay before or afterwards for the woman's favor (Tr. 18). Dupuy had complete notes of his interview with the petitioner, and his testimony as to Coles' story is fully set forth below:

> "All right, he said that he was standing on the corner, I think, Sixth and Clay or Leigh, about 8:30 at night, and a man and woman came down the street. The man walked over to him and said 'I have got a woman here you can get for two dollars, do you want her?' He looked her over and decided he would pay two dollars, and they went down the alley. He said they got in an argument, whether he would pay before or pay after. He wanted to pay after. This was a blind alley. There was a woman that lived in a house by the alley who heard screams, she testified. She heard a woman holler 'just please turn me loose and I will give you my money,' and she called the police. The police arrived and the police testified that he came running out towards the street because he couldn't go the other way, it was a blind alley, with his trousers open in front and his privates—he was puffing and running as far as he could take off. Now, the woman testified that she was coming down the street walking alone and he grabbed her and dragged her in the alley and she screamed and said 'I will give you all of my money if you will just

turn me loose.' I cross-examined her from every angle that I could, as well as the woman who called the police, and the officers. He got on the stand and told his side of it." (Tr. 20-21).

Dupuy pointed out that it was purely a question of fact as to whether or not the rape actually took place (Tr. 26). Dupuy testified that he did not know of the existence of a medical report which did not show the presence of semen. This, of course, in and of itself would not prove the lack of penetration. He indicated that he thought the report would have been helpful in cross-examination (Tr. 37).

Robert J. Smith, the other public defender, who did not actually represent Coles at the time of his trial testified that he did interview Coles at the City Jail on several occasions (Tr. 39), and that the interviews were of sufficient length to prepare the case for trial (Tr. 40).

Coles testified at the hearing in the Hustings Court of the City of Richmond, but gave no other story than that testified to by his attorney.

The Hustings Court of the City of Richmond found that the petitioner had not carried the burden, and this was affirmed by the Supreme Court of Appeals of Virginia. The District Court dismissed the petition, and this case was reversed by the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

The Superintendent will demonstrate that the court below has ignored an established principle of law in reaching its decision in the premises. This Court has previously and repeatedly held that the burden in a habeas corpus proceeding is upon the prisoner to prove his case by a preponderance of the evidence. The court below has discarded

this rule of law and required the Commonwealth to prove facts which, if pertinent, could and should have been proved by the prisoner in carrying his burden. For these reasons, it is submitted that the judgment should be reversed.

ARGUMENT

The Court Erred in Holding That in a Habeas Corpus Proceeding the Burden of Proof Shifts and the Commonwealth is Required to Offer in Evidence Facts Which Are Available to the Prisoner and Can Be Proven by Him If He Deems Them Pertinent.

The status of the case is as follows. The prisoner was granted a full and complete plenary hearing in the Hustings Court of the City of Richmond, which court, after carefully considering the evidence, ruled against the petitioner's contentions. This was affirmed by the Supreme Court of Appeals of Virginia, and the United States District Court thereafter denied the prisoner's petition for a writ of habeas corpus. The case was then heard based on the State court record by the United States Court of Appeals for the Fourth Circuit, which court reversed the judgment of the District Court and ordered the prisoner's release. In doing so, it changed the burden of proof, requiring the Commonwealth to prove the previous chaste character of the prosecutrix. In doing this, however, it did not grant the prisoner or the Commonwealth a plenary hearing on this point, but simply held that since such evidence had not been produced at the State court hearing, the writ would now issue.

This decision is contrary to several decisions of this Court on this very point. First, however, let us briefly examine the opinion of the United States Court of Appeals for the Fourth Circuit. A review of the same will show that it is not supported by the record.

The court points out that counsel was not appointed until August 20, 1963, almost three months after Coles'

arrest. This is not true, for the reason that counsel was appointed and was present on June 11, 1963, some two and one-half weeks after the prisoner's arrest, when he was ordered committed for observation as to his mental condition.

It is true that the two public defenders were appointed to represent some fifty-seven other defendants at the term of court in question. This is true; however, the Fourth Circuit neglects to point out that this occurred over a period of some three months. Assuming that the burden was equally divided, each attorney had approximately 28 or 29 criminal cases to try over that period of time. This statement of the Fourth Circuit is, therefore, not supported by the record. The testimony of Dupuy, the attorney who represented Coles, was that Coles had told him that he had had intercourse with the woman, and this testimony is uncontradicted.

Admittedly, counsel made no investigation of the reputation of the prosecutrix for chastity. Moreover, counsel appointed to represent Coles in the State court made no attempt to prove her reputation at the time of the habeas corpus proceeding. Here, it is quite clear that the Fourth Circuit ignored its own opinion in *Horne* v. *Peyton,* 356 F. 2d 631 (4th Cir., 1966). The Court pointed out in the cited case that the prisoner had failed to show that the failure of his attorney to make a specific investigation of all the court records pertaining to his previous convictions prior to his trial as a recidivist did not invalidate his sentence. The Court emphasized that no evidence had been introduced to show that such an investigation would have produced any result or any information which would have been of assistance to the prisoner at the time of his recidivist trial.

Next, the Fourth Circuit points out that counsel made

no attempt to determine the identity of or to interview the prosecurix's male companion. This is true. The Court ignores, however, the very simple fact that it would have been impossible for Dupuy to have located said witness.

The Fourth Circuit points out that "Counsel for an indigent defendant should be appointed promptly." This was done in this case. The Court points out that counsel should be afforded a reasonable opportunity to prepare a defense. Here, it is quite clear that there was ample time to prepare a defense, and an effort was made to ascertain the prisoner's mental condition.

Again, the Court says, "Although counsel for petitioner were appointed over three weeks prior to trial, the delay of almost three months in the appointment and the fact that they were appointed to represent such a great number of other defendants to be tried at a forthcoming term of court constitutes a colorable fact." This statement is clearly unsupported by the record as hereinbefore pointed out. Moreover, in a footnote immediately following the quoted statement, the Court suggests that there are three or four terms of court annually in the Hustings Court of the City of Richmond. From whence came this suggestion is unknown. The Hustings Court of the City of Richmond has a term of court each month during the year except during the months of August and September, as provided for by the provisions of § 17-155 of the Code of Virginia, and the same is set forth below for the convenience of this Court.

> § 17-155.—There shall be a term of the Hustings Court and of the Hustings Court, Part Two, held for each month in the year, except the months of August and September. For the Hustings Court the terms for the months of January, February, March, April, May, June, July, October, November and December

> shall begin on the first Monday in each of such months; and for the Hustings Court, Part Two, the terms for such months shall begin on the second Monday in each of such months. Each term shall continue as long as the business of the court may require. Any cause or matter cognizable by the court may be heard and disposed of at any term thereof."

As can be seen, here again, the Fourth Circuit's opinion is premised upon facts which are not only not in the record but not true.

The court below says, "The record is clear that counsel did not explain the elements of the crime of rape to petitioner, especially the element of penetration." From a review of the record, we find that the same is silent with regard to this statement. The only evidence in the record is that Dupuy testified that he took all the time necessary to interview his client (Tr. 9).

Admittedly, the other public defender, Smith, testified that his recollection of his client's statement was that he was "trying" to have intercourse with the prosecutrix. This is true. The State court Judge, however, as he may, took the evidence of the attorney who had actually represented him at the time of the trial as a basis for his determination in the premises. This, of course, was most appropriate and should have been the end of the matter. 28 U.S.C., Section 2254, is controlling herein, and the same is set forth below:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency to the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce

that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the offfcial records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

Admittedly, counsel made no attempt to interview Carrie Herbert or to determine what her testimony would be. Her testimony, however, was that she heard a disturbance in the alley and called the police. She saw nothing. This omission of counsel makes little, if any, difference. Moreover, his failure to attempt to locate the unknown male companion of the prosecutrix is of little importance. No one suggested to Dupuy any way that he could locate this purported witness. At the State habeas proceeding Dupuy testifed as follows relative to this phantom witness:

"I didn't make any investigation because he (Coles) didn't know who he was. Nobody that I knew heard anything about him, and I might as well have gone to India to pick out somebody."

The foregoing constitutes a detailed summary of the errors in the court's opinion. We would point, however, to

the fact that the court below has, on the basis of the record before it from the State court, held that the burden is now on the Commonwealth in such a proceeding to prove a lack of prejudice. This is not the law. This Court has repeatedly held that the burden of proof is upon the prisoner.

In *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), this Court placed the burden upon the petitioner in the habeas corpus proceeding as follows:

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without Counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel. If in a habeas corpus hearing, he does meet this burden and convinces the court by a preponderance of evidence that he neither had Counsel nor properly waived his constitutional right to Counsel, it is the duty of the court to grant the writ." (304 U.S. 468)

In *Walker* v. *Johnston,* 312 U.S. 270 (1941), the Court pointed out that in the habeas corpus proceeding, the prisoner at a hearing "would have the burden of sustaining his allegations by a preponderance of the evidence." (312 U.S. 287)

In *Hawk* v. *Olson,* 326 U.S. 271 (1945), this Court pointed out: "Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations, but he is entitled to an opportunity." (326 U.S. 279)

In *Darr* v. *Burford,* 339 U.S. 200, this Court pointed out

that the burden is "on the accused to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in State judicial proceedings, that in his prosecution the State so departed from constitutional requirements as to justify a Federal court's intervention to protect the rights of the accused." (339 U.S. 218)

A review of the foregoing decisions of this Court reveals that it has historically been held that the burden is on the prisoner in a habeas corpus proceeding to prove his case by a preponderance of the evidence and that there is no shift in this burden of proof. Here, the Fourth Circuit Court of Appeals has so departed from the teachings of this Court in this case that the same should be reversed.

It is interesting to note that the decision of the court below is in conflict with not only its own decisions but the decisions in other circuits. Let us first examine the decisions of the Fourth Circuit in this field. In *Root* v. *Cunningham,* 344 F.2d 1 (4th Cir., 1965), the Court said, "Moreover, it may be said that, while a defendant is undeniably entitled to a fair trial accordingly to the law of the land, yet he is not guaranteed a perfect one, and where an attorney gives his client his complete loyalty and serves his cause in good faith and to the best of his ability, the due process requirement for effective assistance of counsel is generally met."

With regard to the question of the available time prior to trial, the Fourth Circuit said in *United States* v. *Ray,* 351 F.2d 544 (4th Cir., 1965), "There can be no predetermination of the length of time needed by court-appointed counsel to prepare for trial, since the requirements will vary greatly. And what may be a reasonable time in one case, could be quite unreasonable in another."

In this case, it is suggested that the attorney should have in fact fabricated a defense when he knew that his client had admitted having intercourse with the prosecutrix. This is contrary to the Fourth Circuit's opinion in *Jones* v. *Cunningham,* 313 F. 2d 347 (4th Cir., 1963), wherein the Court said, "Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make inquiries, to determine whether valid ones exist." Here, the attorney had no reason to believe there was any available valid defense.

The Court places great emphasis on the fact that the attorney failed to ascertain the previous chaste character of the prosecutrix. The Court points out that there is no evidence to show that she was of unchaste character but yet hinges its opinion on the failure of the attorney to make the investigation. This is contrary to its opinion in *Horne* v. *Peyton,* 356 F. 2d 631 (4th Cir., 1966).

As can be seen, the opinion of the court below is in conflict with its opinions.

The United States Court of Appeals for the First Circuit in *Sanchez* v. *United States,* 256 F. 2d 73 (1st Cir., 1958), as well as the District of Columbia Circuit Court of Appeals in *Edwards* v. *United States,* 296 F. 2d 707 (D.C. Cir., 1958); *Gray* v. *United States,* 299 F. 2d 467 (D.C. Cir., 1962); and *Mitchell* v. *United States,* 259 F. 2d 787 (D.C. Cir., 1958), follow the decisions of this Court, holding that the burden is on the prisoner to prove his case by a preponderance of the evidence.

The Second Circuit Court of Appeals in *United States* v. *Reincke,* 341 F. 2d 977, 981-982, stated the general rule applicable to a proceeding of this kind:

> "... The constitutional requirement of the effective assistance of counsel does not require that subsequent

examination disclose that every conceivable avenue of evidence has been totally explored and every possible theory of defense has been pursued to judgment. Proof of inadequacy of counsel has in this circuit been held to a stringent standard. We have repeatedly said,

> 'A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'"

Likewise, the Fifth Circuit Court of Appeals in *Williams* v. *Beto,* 354 F. 2d 698 (5th Cir., 1965); the Sixth Circuit Court of Appeals in *Schaber* v. *Maxwell,* 348 F. 2d 664 (6th Cir., 1965); the Seventh Circuit Court of Appeals in *United States* v. *Dilella,* 354 F. 2d 584 (7th Cir., 1965); the Eighth Circuit Court of Appeals in *Taylor* v. *United States,* 282 F. 2d 16 (8th Cir., 1960); the Ninth Circuit Court of Appeals in *Reid* v. *United States,* 334 F. 2d 915 (9th Cir., 1964); and the Tenth Circuit Court of Appeals in *Nutt* v. *United States,* 335 F. 2d 817 (10th Cir., 1964), have all followed this Court's rule as to the burden of proof. Moreover, in all of the cited cases, the courts have held repeatedly that effective assistance of counsel does not mean successful assistance of counsel. It means only that the attorney apply himself in the manner he knows best employing the appropriate judgment and his experience in defending his client. Here, it is manifest that this was done.

Lest there be no confusion, it is manifest that had Dupuy known of the medical report, he should have sought a copy of the same. There is no evidence in the record to support the majority opinion in the court below that every practicing lawyer knew that it was the uniform practice of the Richmond Police Department to have such a medical examination made after a charge of rape had been filed. Moreover,

it is clear that Dupuy, had he known of this, would have sought such a report by his testimony. The medical report in and of itself would not have been of great assistance at the time of the trial of the case, in view of the woman's testimony. The penalty for rape in Virginia is provided by § 18.1-44 of the Code, and the same is set forth below for the convenience of the Court:

> "If any person carnally know a female of sixteen years of age or more against her will, by force, or carnally know a female child under that age or a female inmate of any hospital for the insane, who has been adjudged a lunatic, or any female who is an inmate or pupil of an institution for deaf, dumb, blind, feeble-minded, or epileptic persons, he shall, in the discretion of the court or jury, be punished with death, or confinement in the penitentiary for life, or for any term not less than five years. But if such female child be between the ages of fourteen and sixteen years and not an inmate or pupil of such institutions hereinbefore mentioned, and consents to the carnal knowledge, the punishment shall be confinement in the penitentiary not less than one nor more than twenty years."

The penalty for attempted rape is found in the provisions of § 18.1-16 of the Code, and the same is also set forth below for the convenience of the Court:

> "Every person who attempts to commit an offense which is punishable with death, shall be confined in the penitentiary not less than one nor more than twenty years, except that attempts to commit rape, other than rape not punishable with death, shall be punishable with death or, in the discretion of the jury or the court trying the case without a jury, by confinement in the penitentiary for life or for any term not less than three years."

Here, it is quite clear that the penalty for both rape and attempted rape in Virginia is the same and that the prisoner could have received the death penalty under the circumstances.

It is submitted that the dissenting opinion of Judge Craven correctly states the law applicable to a case of this nature. Judge Craven points out that Dupuy was of opinion, based on his client's testimony, that he had intercourse with the victim, that his failure to interview the witness who heard the screams and who saw nothing was immaterial, and that it was in fact ridiculous to suggest that he should try to locate this unknown witness. Judge Craven pointed out quite clearly that counsel had made no investigation of the reputation of the prosecutrix for chastity. He points out, however, that the record is bare of any suggestion that there was any evidence available then or now which would have tended to present her in a bad light. There is no evidence to show that Coles was prejudiced by any of the acts of commission or omission of Dupuy. It is quite clear that if there is evidence of unchaste character of the prosecutrix, it should have been presented by the petitioner. If this had been proven, there can be no question but that his case would be clearer in his behalf. Without such evidence, it is manifest that the decision of the court below is incorrect and contrary to this Court's decisions in similar cases.

While the shifting of the burden of proof to the Commonwealth by the Fourth Circuit is unsupported in law, its decision to cause the issuance of the writ without granting the State an opportunity to present evidence in this regard is clearly in error. The court below has in effect changed the rules of the game while the same is in progress and effectively denied to the people of the Commonwealth of Virginia the right to prove a case, which the court says

she must now prove. There is no precedent for a decision of this nature, and it is submitted for this reason that the judgment of the court below should also be reversed.

CONCLUSION

Your petitioner has demonstrated clearly and concisely that the court below has departed from the established teachings of this Court in cases of similar nature. Its decision is contrary not only to the decisions of this Court but to the decisions of other courts in its evaluation of that which constitutes the burden of proof and ineffective representation by counsel. Moreover, by its decision it has changed the rules of evidence and then denied to the Commonwealth her right to prove a case which the court says now must be proven.

For these reasons, it is respectfully submitted that the writ of certiorari should be granted and this case reversed.

Respectfully submitted,

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Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 5th day of April, 1968, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgments of the United States Court of Appeals for the Fourth Circuit by first class mail to S. Strother Smith, III, Esquire, Attorney at Law, 212 East Main Street, Abingdon, Virginia 24210, counsel for the respondent herein.

RENO S. HARP, III
Assistant Attorney General of Virginia